

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 247 Beverage Law
SPONSOR(S): Bogdanoff and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 144, SB 282, SB 944

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Business Regulation Committee		Morris	Liepshutz
2) Finance & Tax Committee			
3) Commerce Council			
4)			
5)			

SUMMARY ANALYSIS

A recent U. S. Supreme Court ruling, *Granholm v. Heald*, struck down laws in Michigan and New York, similar to Florida law, allowing in-state wineries to make direct deliveries of wine to consumers, but prohibiting out-of-state wineries from making direct deliveries. The Court held that the laws in both states discriminated against interstate commerce to the benefit of in-state interests in violation of the Commerce Clause, Art. I, s. 8, cl. 3, and that the discrimination was neither authorized nor permitted by the Twenty-first Amendment. Subsequent to the *Granholm* decision the U. S. District Court in Tampa ruled, in a pending Florida case *Bainbridge v. Turner*, that ss. 561.54(1) and (2) and 561.545(1), F.S., also discriminated against out-of-state wine producers to the advantage of in-state wine producers and were unconstitutional under *Granholm*.

In response to the *Granholm* and *Bainbridge* decisions, this bill creates a direct shipper license and the regulatory mechanism which allows the direct shipment of wine by out-of-state or in-state direct shippers to Florida consumers for personal consumption and to Florida vendors for resale.

A Bill Impact Conference has not been scheduled to evaluate the potential fiscal impact of this legislation on state revenue collections and expenditures. See FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT for an estimate of expenditures by the Division of Alcoholic Beverages and Tobacco in the Department of Business and Professional Regulation.

The bill provides that the act will take effect upon becoming a law.

[The sponsor of this legislation plans to offer a strike-all amendment to the bill at the February 7, 2006, Business Regulation Committee meeting.]

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty--Both commercial and individual freedom are expanded by allowing of out-of-state as well as in-state entities to sell wine directly to Florida consumers or vendors without the restrictions of the current three-tier system of alcoholic beverage distribution.

Provide Limited Government—The bill creates a new license and regulatory system; the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation estimates the need for 23.5 FTEs and approximately \$1.3 million annually to implement and regulate the direct shipment of wine as provided in this legislation.

B. EFFECT OF PROPOSED CHANGES:

HISTORY OF ALCOHOL BEVERAGE REGULATION

Methods of controlling alcoholic beverage commerce have varied from complete inaction to absolute prohibition. Adopted in 1920, the 18th Amendment to the U. S. Constitution ushered in prohibition by forbidding the manufacture, sale, transportation, importation and exportation of beverage alcohol. The 21st Amendment to the U. S. Constitution, adopted in 1933, repealed prohibition. The 21st Amendment prohibits the transportation or importation into any state in violation of that state's laws and places the responsibility of controlling alcoholic beverage commerce upon the individual states for all activity within that state's borders.

The ability to engage in alcoholic beverage commerce is commonly viewed as a privilege subject to stringent safeguards. Alcoholic beverages are a highly taxed and highly regulated commodity. In addition to protecting the public from the harms of excess and other objectionable conditions that preceded prohibition, the framers of state and federal laws sought to provide sufficient regulatory authority under which enforcement of the beverage laws and the collection of license fees and taxes could be achieved.

Currently in the United States, most states operate under a "license" system. "License" states issue licenses to private individuals or businesses in all segments of alcoholic beverage commerce. The State of Florida operates under such a license system. Other states, however, maintain more direct control over the sale of alcoholic beverages by substituting the state for the private marketplace and are known as "control" states. Some states control only the wholesale level; others have retained control at retail through government-operated stores; and some control the sale of wine, as well as distilled spirits.

The Division of Alcoholic Beverages and Tobacco [division] in the Department of Business and Professional Regulation is responsible for supervising the conduct, management, and operation of the manufacturing, packaging, distribution, and sale within the state of all alcoholic beverages. This authority includes licensing businesses, conducting criminal and administrative investigations; conducting audits, inventories and tax assessments; seizing non-tax paid alcoholic beverages; imposing penalties for violations. The licensed premises of a Florida alcoholic beverage licensee are subject to random, unannounced inspection and a licensee can lose the ability to operate for violations of the Beverage Law or other state laws. Licensure requirements, qualification standards and prohibitions are set forth in ss. 561.15 and 561.17, F.S.

Florida's alcoholic beverage law provides for a structured three-tiered distribution system: manufacturer, wholesale distributor, and retailer.¹ Alcoholic beverage excise taxes are collected at the wholesale level and the state sales tax and by-the-drink tax are collected at the retail level. For FY 2004-05 the Division collected \$575.9 million in state alcohol excise taxes [\$117.8 million from wine products] and the Office of Demographic Research estimates that \$549.3 was collected from the retail sale of all alcoholic beverages in the state; estimates specific to wine were not available. Alcoholic beverage wholesalers are audited twice each year. In general, the excise tax rate on wine is \$2.25 per gallon.²

¹ See s. 561.14, F.S. for license and registration classifications

² Section 564.06, F.S., establishes a staggered taxation rate on wine based upon the percent of alcohol by volume. Typical table wine containing 0.5 percent or more alcohol by volume but less than 17.259 percent alcohol by volume is taxed at a rate of \$2.25 per gallon.

Activities between the license groups are extensively regulated and constitute the basis for Florida's "Tied House Evil" law.³ Among those restrictions, s. 561.42, F.S., prohibits a manufacturer or distributor from having any financial interest, directly or indirectly, in the establishment or business of any vendor. Manufacturers and distributors are also prohibited from assisting any vendor by any gifts or loans of money or property of any description or through rebates.

Section 561.22, F.S., provides that no manufacturer, distributor or exporter may be licensed as a vendor [retailer]. This statute further provides that no vendor may also be licensed as a manufacturer, distributor or exporter. Section 561.24, F.S., provides that no manufacturer, rectifier or distiller of spirituous liquors or wine can be licensed as a distributor or registered as an exporter. Vendors are explicitly prohibited from importing any alcoholic beverage from outside the state, s. 561.14, F.S. The Beverage Law allows Florida retailers to ship alcoholic beverages directly to Florida consumers, s. 561.57, F.S. A simple explanation of the Florida Beverage Law is that the law requires all alcoholic beverages to move through three separate regulated tiers, manufacturer ► wholesale distributor ► retail vendor, before reaching the ultimate consumer.

Notwithstanding the overall premise, the Beverage Law contains a series of exceptions to the structured three-tiered distribution system. Included among those exceptions is authority for the licensure of wineries where the manufacturer of the beverage is also the wholesale distributor and the retail vendor of the product.

Section 561.221, F.S., authorizes the issuance of up to three vendor [retail] alcoholic beverage licenses for wine manufacturers in the state if the retail premises are situated on property contiguous to the manufacturing premises. Florida wineries may also be dually licensed as wholesale distributors. In addition, qualifying wineries may receive a designation as a Certified Florida Farm Winery.⁴ To qualify, a winery must:

- Produce or sell less than 250,000 gallons of wine annually;
- Maintain a minimum of 10 acres of owned or managed vineyards in Florida;
- Be open to the public for tours, tastings, and sales at least 30 hours each week;
- Make application for the designation and pay an annual fee of \$100.

Florida Farm Wineries may also be issued permits to conduct tastings and sales of wine produced by the certified Florida Farm Winery at fairs, trade shows, expositions, and festivals.

HISTORY OF DIRECT SALES

In recent years there has been an expansion of solicitations and advertisements for alcoholic beverage sales, particularly wine, via magazines, specialty catalogues, direct mailings and, more recently, the Internet. In addition, there has been increased interest on the part of consumers to more easily obtain their specific wines of choice via these alternatives. Sales of this nature most often bypassed the state's regulatory and tax collection procedures and were, therefore, in violation of Florida law which generally requires all alcoholic beverages to pass through three separate regulated tiers: manufacturer, wholesaler, and retailer, before reaching the ultimate consumer. During this same time period consumers and wine industry interests have sought the ability to legally ship wine into the various states through reciprocity laws or laws allowing for limited direct shipping.

In the early 1990's the Division of Alcoholic Beverages and Tobacco issued numerous requests to out-of-state shippers to discontinue the practice of selling and shipping alcoholic beverages, primarily wine, directly to Florida consumers in violation of state law. The division, however, lacked legal jurisdiction to require compliance on two fronts: 1) since the out-of-state shippers did not maintain a physical presence in the State of Florida there was no nexus to bring them under Florida jurisdiction; and 2) federal law did not provide a remedy by which the state could receive injunctive relief in federal courts.⁵ This scenario appeared to leave Florida regulators without a means to require out-of-state shippers to comply with Florida's regulatory and taxation requirements.

³ In the beverage alcohol industry, licensed premises are often called "houses." It was perceived to be an *evil* for houses of the retail tier to be tied to houses at the wholesaler or manufacturing tier – hence, *Tied House Evil*. This group of laws is designed to prevent manufacturers or wholesalers from owning or controlling retail outlets where their product may be sold to the exclusion of other products and where, during pre-prohibition years, an abundance of social ills existed.

⁴ According to the Division of Alcoholic Beverages and Tobacco there are currently 37 licensed wineries in Florida. There are 13 Certified Florida Farm Wineries located in the state.

⁵ See *Department of Business and Professional Regulation v. Sam's Wines and Liquors*, No. 96-3602, (Fla. 2nd Cir. Ct., September 3, 1997), *affirmed* 731 So.2d 655 (Fla. 1st DCA 1999) and *Florida DBR v. Zachy's*, 125 F.3d 1399 (11th Cir. 1997)

The Legislature, in 1997, found that the direct shipment of alcoholic beverages was a danger to the public health, safety, and welfare; to state revenue collections; and to the economy of the state. The 1997 Legislature enacted Chapter 97-213, Laws of Florida, which increased the penalty from a misdemeanor to a 3rd degree felony for knowingly and intentionally shipping alcoholic beverages from an out-of-state location directly to a Florida consumer in violation of the Beverage Law. Some argued that this penalty increase would act as a deterrent to direct shipping since a wine manufacturer would not risk losing their federal permit by being charged with a felony.⁶ Others argued that the penalty and the underlying regulatory structure were antiquated, anticompetitive, and a violation of free trade between the states.

Florida's direct shipping statute was subsequently challenged in *Bainbridge v. Turner*.⁷ During this same period similar challenges were taking place in other states, including Michigan and New York, with mixed results.

DIRECT SHIPPING LITIGATION

Granholm v. Heald

Similar to Florida's law, the State of Michigan banned out-of-state wineries from shipping wine directly to consumers but allowed in-state wineries to do so. The State of New York allowed direct shipments to residents but only if the out-of-state shipper obtained a license and a condition of obtaining that license was a physical presence in the state. Both laws were challenged and Michigan's law was held invalid while the New York law was upheld. Appeals from these two cases were ultimately consolidated into a single case before the U. S. Supreme Court, *Granholm v. Heald*.⁸ In its decision, the Court attempted to balance two parts of the U. S. Constitution: the Commerce Clause which requires unrestricted trade between the states and the 21st Amendment which gives regulatory power to the states over all alcoholic beverage sales within that state's borders.

The question before the Supreme Court was: *Does a state regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the Twenty-first Amendment?*

Section 2 of the 21st Amendment to the U. S. Constitution reads: *The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.*

The U. S. Supreme Court struck down both the Michigan and New York laws. The Court held that the laws in both states discriminated against interstate commerce in violation of the Commerce Clause, Art. I, s. 8, cl. 3, and that the discrimination was neither authorized nor permitted by the Twenty-first Amendment.

The Court ruled that either all sales of wine must be through face-to-face transactions or a permit system must be developed to allow for wine deliveries from out-of-state which did not discriminate against out-of-state interests to the benefit of in-state interests. The Court stated that tax collection and other regulatory objectives -- facilitating orderly market conditions, ensuring regulatory accountability, protecting the public health and safety - could be achieved through a permit system. States may not require residency of wine producers in order to compete on equal terms with in-state businesses, nor may states require reciprocal shipping privileges for wine producers from other states. The Court's decision addresses only wine producers. The Court specifically distinguished other products and the opinion does not directly open the door for out-of-state retailers to ship direct. The Court made a clear distinction between laws regarding direct sales by wine producers as distinguished from the state's regulation within its borders of the resale of alcohol beverages.

The Court did not specifically address the issue of personal jurisdiction for purposes of enforcement but referenced the authority of the states' attorneys general to seek injunctive relief in federal court under the 21st Amendment Enforcement Act and a winery's potential loss of its federal basic permit as incentive to comply with a state's alcoholic beverage statutes. [See also **Federal Law** comments.]

The traditional three tier system of alcohol beverage distribution utilized by Florida and many other states was held to be legitimate as long as state laws satisfy the key holdings of *Granholm*.

⁶ The Federal Alcohol Administration Act, 27 U.S.C. s. 203, requires a basic permit in order to engage in the business of importing into the United States distilled spirits, wine, or malt beverages, to engage in the business of distilling spirits or producing wine, and for wine, spirits and beer wholesalers. Retailers and beer manufacturers are not required to obtain a federal basic permit.

⁷ *Bainbridge v. Turner*, Case No. 8:99-CV-2681-T-27TBM; Originally *Bainbridge v. Martelli*, 148 F.S.Supp.2d 1306 (M.D. Fla. 2001)

⁸ *Granholm v. Heald*, 125 S.Ct. 1885 (May 16, 2005)

Bainbridge v. Turner

At a status conference held by the court on May 25, 2005, the State conceded that based upon the *Granholm* decision the two statutes in question in *Bainbridge v. Turner*,⁹ ss. 561.54(1)-(2) and 561.545(1), F.S., were unconstitutional.

Subsequently, an August 5, 2005 Order issued by U. S. District Court Judge James Whittemore in Tampa found the two statutes in question in *Bainbridge* violated the Commerce Clause to the extent that they discriminate against out-of-state wineries by prohibiting them from selling and delivering wine directly to customers in Florida when in-state wineries are not so prohibited.

“Florida’s direct shipment scheme, codified in ss. 561.54 and 561.545, Florida Statutes, does precisely what was determined to be unconstitutional in *Granholm*. Florida’s direct shipment statutes prohibit *out-of-state vendors and producers* from delivering wine directly to Florida residents whereas in-state producers are not so prohibited. Florida’s statutory scheme requires out-of-state wine to pass through a wholesaler and retailer, whereas wine produced in Florida is not required to pass through a wholesaler and distributor. Florida’s statutory scheme thereby discriminates against out-of-state wine producers to the advantage of in-state wine producers in violation of the Commerce Clause and is therefore unconstitutional under *Granholm*.” [Emphasis supplied]

While the Order enjoined the State from enforcing the two statutes in question, it is unclear whether direct wine shipments are allowed under the statutory scheme remaining in place. Further, it remains unclear whether this injunction is limited to out-of-state wineries or permits direct shipments by out-of-state wineries and *other shippers* that are not wineries. The Order did not address the constitutionality of these statutes with regard to other alcoholic beverages such as beer and spirits. A legislative response to *Granholm* and *Bainbridge* is required to clarify Florida law.

FEDERAL LAW

Two federal laws are relevant to this issue.

First, the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. s. 203, requires a basic permit in order to engage in the business of importing into the United States, distilled spirits, wine or malt beverages. Likewise, a basic permit is required to engage in the business of distilling spirits or producing wine. A basic permit is also required for spirits, wine and malt beverage wholesalers. Retailers are not required to obtain basic permits under the FAA Act. The FAA Act provides that basic permits are conditioned upon, among other things, compliance with the Twenty-first Amendment and other Federal laws relating to its enforcement.

The Bureau of Alcohol, Tobacco, and Firearms [now Bureau of Alcohol and Tobacco Tax and Trade] in ATF Ruling 2000-1 ruled that the Bureau could, under appropriate circumstances, take administrative action against a basic permit where a basic permittee ships alcoholic beverages into a State in violation of the laws of that State.

“ATF will intervene when it is determined that there is a continuing, material, adverse impact upon a State through the actions of a basic permittee located outside the boundaries of the affected State. However, while ATF is vested with authority to regulate interstate commerce in alcoholic beverages pursuant to the FAA Act, the extent of this authority does not extend to situations where *an out-of-State retailer* is making the shipment into the State of the consumer.” [Emphasis supplied.]

Second, the Twenty-first Amendment Enforcement Act, 27 U.S.C. s. 122a, provides the federal district courts with subject matter jurisdiction over any action brought by a state attorney general against a person who is engaged in, or has engaged in, the illegal transportation of alcoholic beverages into a state. The act prohibits the direct shipment of wine into a state in violation of state laws and authorizes state attorneys general the power to sue wineries in federal court to enjoin violations of state law. There are no known instances where a state attorney general has utilized this law.¹⁰

⁹ *Bainbridge v. Turner*,⁹ Case No. 8:99-CV-2681-T-27TBM, (M.D. Fla. August 5, 2005)

¹⁰ Information gathered from conversations with industry representatives; see also *Interim Project Summary 2006-146*, Committee on Regulated Industries, the Florida Senate, October 20005.

EFFECT OF PROPOSED CHANGES

This bill creates a new s. 561.585, F.S., and the license and regulatory mechanism which allow the direct shipment of wine into Florida for personal consumption or for vendor resale.

A direct shipper license is not limited to wineries but may be issued to any person, firm, corporation, or other entity. To obtain a direct shipper license an applicant must maintain licensure as a primary American source of supply, provide the division with a copy of its current alcoholic beverage license issued by this or another state, and pay a \$100 license fee. Direct shipper licenses may be renewed annually upon payment of a \$100 renewal fee and proof of continued qualification.

Primary American Source of Supply

For purposes of tax revenue control s. 564.045, F.S. requires the registration of each brand of wine sold in Florida and the licensure of that brand's "primary American source of supply" [PAS]. There is only one PAS for each brand and each brand must have a licensed PAS. Generally, the PAS is either the wine manufacturer or the source closest to the manufacturer in the channel of commerce from whom the product can be secured. Licensure as a PAS authorizes the shipment of wine manufactured within and without the state to licensed distributors, importers, manufacturers, bonded warehouse, and registered exporters within the state. Applicants for a PAS license are not required to meet the licensure requirements and qualification standards set out in ss. 561.15 and 561.17 that are required of other alcoholic beverage licensees.

This bill requires as a condition of licensure as a direct shipper that the applicant obtain and maintain a current license as a primary American source of supply.

Record Retention, Reporting Requirements and Tax Payments

The Beverage Law requires manufacturers, distributors, sales agents, importers, and exporters to maintain records and make monthly reports to the division of all beverages manufactured, imported, exported, and sold within the state. Reports must be made by the 10th day of each month and records must be maintained for a period of three years. Excise taxes must be paid by the 10th day of each month and licensed wholesalers are audited twice each year for compliance. In addition, alcoholic beverage manufacturers and wholesalers are required to file a surety bond with the division to ensure the payment of all taxes. The surety bond for a winery is \$5,000 and for a wine distributor is \$25,000. [See ss. 561.37, 561.50, 561.55, F.S.]

This bill places reporting, tax payment and records retention requirements for direct shipments in newly created s. 561.585 (3) and (4), F.S., and requires direct shippers to report monthly to the division the total amount of wine by type shipped into the state for the preceding month. Direct shippers are required to pay the appropriate excise tax to the division and the appropriate sales tax to the Department of Revenue monthly. The bill provides that Internet orders received by a vendor will be construed as a sale actually made at the vendor's licensed place of business. Records of the direct shipments, including the names, addresses, amounts, and dates of all shipments to persons in this state must be maintained and are subject to audit by the Division of Alcoholic Beverages and Tobacco or the Department of Revenue upon request. No audit schedule is provided and there is no surety bond requirement.

Age Verification

The Beverage Law makes it unlawful for any person to sell, give, serve, or permit to be served any alcoholic beverage to a person less than 21 years of age. A violation of this prohibition constitutes a 2nd degree misdemeanor. In addition, a vendor's alcoholic beverage license is subject to suspension or revocation for unlawful sales to persons under the age of 21 by the licensee or an employee of the licensee and for other violations of the Beverage Law. The Beverage Law does not specifically require a vendor to check identification to verify age prior to sale but provides a complete defense to a vendor making an unlawful sale if: 1) the person falsely evidenced that he or she was of legal age to purchase or consume the beverage; 2) the appearance of the person was such that an ordinarily prudent person would believe him or her to be of lawful age; and 3) the licensee or employee checked one of the approved forms of identification. For these purposes approved forms of identification include: a driver's license, an identification card issued by this state or another state, a passport, or a United States Uniformed Services identification card. [See s. 562.11, F.S.] Likewise, the Beverage Law does not specifically require a licensee or an agent of the licensee making a delivery of an alcoholic beverage to check identification to verify the recipient is at least 21 years of age.

This bill, in newly created s. 561.585(2), F.S., mandates that the direct shipper must require that the signature of the recipient is obtained prior to delivery and after presentation of a valid identification showing the recipient is 21 years of age or older. Acceptable forms of identification are the same as specified in s. 562.11. This new subsection also requires the direct shipper to place "SIGNATURE OF ADDRESSEE AGE 21 OR OLDER REQUIRED FOR DELIVERY" on the outside shipping label of each package.

Similarly, the bill amends s. 561.57(6), F.S., to require all common carriers acting as agents for delivery to verify that a person receiving alcoholic beverages is at least 21 years of age and requires the division to adopt rules. This amendment specifies that adherence to these age verification procedures provides the common carrier and the licensee or other person hiring the common carrier with a complete defense of selling, giving or serving alcoholic beverages to any person under the age of 21.

Common Carriers

Section 562.20, F.S., requires common carriers to file monthly reports of alcoholic beverages deliveries into or within the state with the division. Section 561.57, F.S., authorizes Florida vendors to make deliveries away from their places of business of sales actually made at the licensed business location and specifies that telephone and mail orders shall be construed as sales actually made on the licensed premises.

Section 561.57(5), F.S., is amended by this bill to add Internet orders, in addition to telephone and mail orders, as a sale actually made at the vendor's licensed place of business. Subsection (6) of s. 561.57, F.S., is amended to permit a common carrier or any licensee or other person utilizing a common carrier as his or her agent to make deliveries of alcoholic beverages into the state and exempts them from the report filing requirements in s. 562.20, F.S.

This bill creates a new subsection (3) in s. 561.54, F.S. and a new paragraph (5)(c) in s. 561.545, F.S., to create an exception to the direct shipping prohibitions contained therein and allow the shipment of wine by a licensed direct shipper and delivery by a common carrier in accordance with newly created s. 561.585, F.S.. Sections 561.54 and 561.545, F.S., were the two statutory provisions ruled unconstitutional in *Bainbridge*.

Penalties

Newly created s. 561.585(6), F.S. provides that in addition to the penalties provided by s. 561.545, F.S., the division may suspend or revoke a direct shipper's license or impose fines for any violation of the newly created s. 561.585, F.S. and its related laws or rules. In addition, any direct shipper, or anyone transporting wine from an out-of-state location, that knowingly and intentionally ships wine directly to any person in this state who is under 21 years of age commits a felony of the third degree. Further, this subsection provides that any person who obtains wine from a direct shipper in violation of s. 561.585, F.S., commits a misdemeanor of the second degree.

Jurisdiction

The bill creates a new s. 561.585(5), F.S., which specifies that by obtaining a direct shipper license the licensee is deemed to have consented to the jurisdiction of the division and to any other state agency and the courts of this state concerning enforcement.

Fiscal Impact

A Bill Impact Conference has not been scheduled to evaluate the potential fiscal impact of this legislation on state revenue collections or expenditures. The Division of Alcoholic Beverages and Tobacco, Department of Business and Professional Regulation has made preliminary estimates based on a number of assumptions. Please see II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT portion of the bill analysis.

C. SECTION DIRECTORY:

Section 1. Creates a new s. 561.585, F.S., creating a direct shipper license and authorizing the direct shipment of wine for personal consumption or vendor resale.

Section 2. Creates a new subsection (3) in s. 561.54, F.S., allowing common carriers to deliver wine directly to Florida consumers 21 years of age or older and to retail vendors and exempting those shipments from the direct shipping prohibitions in s. 561.54.

Section 3. Amends s. 561.545(5), F.S., authorizing the direct shipment of wine to individuals and retail vendors by licensed direct shippers and exempting those shipments from the direct shipping prohibitions and penalties in s. 561.545.

Section 4. Amends s. 561.57, F.S., to construe Internet orders as taking place on the vendor's licensed premises, exempting common carriers from certain reporting requirements, providing for age verification procedures, and providing a defense for common carriers and licensees for certain unlawful sales.

Section 5. Provides that the act will take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

A. FISCAL IMPACT ON STATE GOVERNMENT

The Division of Alcoholic Beverages and Tobacco, Department of Business and Professional Regulation provided the following estimate of revenue:

Licensing Fees:

The State of Florida will receive a \$100 licensing fee for every direct shipper who wishes to ship wine directly to consumers in Florida. It is unknown how many direct shippers will be licensed, but if each of the current 1,098 Primary American Source (PAS) registrants become licensed during the first year it would generate additional licensing revenue of \$109,800 annually. In addition, to known PAS registrants, there could be a substantial increase from other direct shippers, e.g. retailers, who wish to become licensed to sell directly into Florida.

Excise Taxes:

Direct shippers are required to pay excise taxes on all wines shipped directly to individuals and vendors in this state. The amount of excise tax generated by HB 247 is difficult to estimate because there is no current data on the number of consumers in Florida that purchase wine or would purchase wine via direct shipments into Florida. Assuming that $\frac{1}{2}$ of 1% of the consuming population will purchase directly, there could be 60,000 individual recipients. This bill also allows vendors to purchase wine from licensed direct shippers. There are approximately 36,151 licensed vendors selling wine in Florida. Some individuals might purchase from the vendors, thus reducing the anticipated numbers who would purchase directly from the direct shipper. For analysis purposes, it is assumed that one quarter of either identified group will purchase directly from direct shippers. For analysis purposes, it is assumed that individuals will purchase at least four cases of wine each per year and that vendors will purchase at least 20 cases of wine each per year. With one case of wine equaling 2.38 gallons and assuming an excise tax rate of \$2.25 per gallon, the estimated excise tax collection would be \$1,287,905 for the first year. A 2% increase each year would generate excise taxes of \$1,313,663 and \$1,339,936 in the following two years.

REVENUE			
	FY 2006-07	FY 2007-08	FY 2008-09
License Fees:	109,800	117,600	130,400
Taxes:	1,287,905	1,313,663	1,339,936
Other (identify):	0	0	0
TOTAL:	1,397,705	1,431,263	1,470,336

2. Expenditures:

The Division of Alcoholic Beverages and Tobacco in the Department of Business and Professional Regulation estimates the need for 23.5 additional positions to implement and regulate the direct shipment of wines into the State of Florida pursuant to this legislation and provided the following information:

Licensing:

Based on the foregoing assumptions, there will be an increase of an estimated 1098 out-of-state shippers' licenses to be processed each year. It is estimated that the increase in workload will require one half-time Regulatory Specialist II position. This position will license the out-of-state shippers and microfilm all of the corresponding licensing records. It will be necessary to keep this permanent position in order to maintain the continual licensing and registering processes.

Auditing:

With each of the 1,098 potential direct shippers reporting each month, a total of 13,176 reports can be anticipated annually. Utilizing 30 minutes to process each report, and using 1,854 available work hours per employee, the Bureau of Auditing will need 4 additional Revenue Specialist positions in addition to current staff for monthly report processing.

The frequency of audits is not determined by the bill. In-state manufacturers are currently audited semi-annually by the division. Although this audit frequency may not be practical for the out-of-state entities, by auditing the estimated 1,098 licensed direct shippers biannually, and requiring a minimum of 16 hours to perform each audit, the Bureau of Auditing would need 9 additional Tax Auditor positions to perform excise tax audits. Estimated travel of \$12,000 will be required annually per auditor, which will encompass one trip per month, per auditor.

Enforcement:

The enforcement program will require four new law enforcement positions to be stationed throughout the state for the enforcement of this new law and two new Administrative Assistant positions to administer complaint paperwork. The law enforcement positions will be required to investigate violations and prepare criminal court prosecutions for failing to register, tax compliance, non-payment of fees, and sales of alcohol to minors.

Information Technology:

There will be a need for extensive computer programming for the direct shipment program within the department and the division. A licensing program must be developed or enhanced in our current licensing system to incorporate the licensing of the out-of-state suppliers. This is a new program that the division's systems do not currently support. A records maintenance system will be needed to incorporate the additional records that must be maintained for the new licensees. Again, the current systems do not support these types of records. Extensive report and tax data information capture systems must be developed to trace shipments between the out-of-state licensed shippers and the in-state recipients. This should be an Internet-based reporting program or some form of electronic filing system. Current systems will not support the amount of information coming from this type of reporting. In addition, audit programs must be developed to verify the accuracy of the reported shipments and taxes paid. Information Technology will need one additional position, a Systems Programming Administrator, to develop and maintain these programs.

Office of the General Counsel:

An additional senior attorney position will be required to assist the division in the implementation and enforcement of the program. The attorney position will incur travel costs once enforcement actions are commenced. Estimated travel of 1 trip per month at \$500 per month for 12 months would be \$6,000.

Service Operations:

The new license requires an annual renewal, which will create a workload increase in the Central Intake Unit. Annual renewals increase the revenue activity and renewal of license records. Support of these license records is performed throughout the life of the record. The division will need two Regulatory Specialist II positions to process annual renewals for a conservative base of 1,000 records. In addition, these positions will perform data entry needed to maintain license records, including name, address and renewal changes. A significant increase in the estimated number of new licenses will require a proportionate increase in new positions the bureau will need.

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
Non-Recurring Effects	FY 2006-07	FY 2007-08	FY 2008-09
Operating Capital Outlay	45,050	0	0
Other Personal Services	0	0	0
Other Expenses	77,457	0	0
Subtotal	122,507	0	0

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
Recurring Effects	FY 2006-07	FY 2007-	FY 2008-09

		08	
Salaries/Benefits 23.5 FTE's	1,065,131	1,103,476	1,131,063
Expenses	262,055	262,055	262,055
Other DMS/Hr Svc.	9,236	9,568	9,807
Subtotal	1,336,421	1,375,099	1,402,925

Non-Operating Expenditures	<u>FY 2006-07</u>	<u>FY 2007-08</u>	<u>FY 2008-09</u>
Service Charges (to General Revenue)	9,896	10,503	11,476
Other Indirect Costs	0	0	0

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to the Federal Trade Commission bans on interstate direct shipping of wine represent the single largest regulatory barrier to expanded e-commerce of wine.¹¹ Many wine producers reportedly rely on the Internet to market their product and implementation of this legislation would support the increased viability of these businesses.

It is unknown to what extent the availability of direct-to-consumer purchases and direct to retail sales of wine will decrease sales made at licensed Florida retail locations and from licensed wholesalers.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Please see Direct Shipping Litigation on Page 4 of the bill analysis.

B. RULE-MAKING AUTHORITY:

The division is required by rule to prescribe the age verification process of common carriers.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Division of Alcoholic Beverages and Tobacco, Department of Business and Professional Regulation offered the following observations:

1. This bill permits licensed direct shippers to ship alcoholic beverages to licensed vendors which is in conflict with 561.14, F.S., which restricts vendor purchases from other than a Florida licensed wholesaler.

¹¹ *Possible Anticompetitive Barriers to E-Commerce: Wine*, Federal Trade Commission, July 2003 @ page 3. Report available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>

2. The Division will not know whether ID checks are being performed if reports are not required to be submitted.
3. The inclusion of the names, addresses, amounts, and dates of all shipments to persons in this state when requiring the direct shipper to maintain records may restrict what the Division can ask for when performing an audit, such as the signatures for age verification.
4. The bill does not address brand registrations required of the primary American source of supply in s. 545.045, F.S.
5. The major concern of this bill is the difficulty in estimating the costs and number of FTEs associated with the enforcement. If responsibility for checking ID rests with the common carrier, ID checking mechanisms and acceptable practices for checking ID are not described. If common carriers are not required to notify ABT of shipments of wine, ABT will not be able to ensure compliance with applicable law.
6. If a complaint alleges that wine was unlawfully delivered to underage persons at a residence, there is no authority for an ABT agent to enter a person's private dwelling to investigate. Any other complaint related to direct shipment of wine to a residence would pose the same statutory limitations on a sworn or non-sworn member of ABT.
7. The increase in excise tax collections could be offset by a corresponding decrease in taxable wine sales by Florida retailers. Regulation of out-of-state shippers will increase costs and difficulty of ensuring payment of appropriate taxes.
8. The bill may not eliminate the unequal treatment of in-state wineries and out-of-state wineries.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The sponsor of this bill is expected to offer a strike-all amendment at the Business Regulation Committee meeting on February 7, 2006.